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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 917 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MALTIBEN @ MAHANT MALTIDASJI GURU VENKATESHWERDASJI

Versus

FLORENCE, WD/O. SAM MENASAN HAEEMS

Appearance:

MR MH BAREJIA for Petitioner

MR ND NANAVATI for Respondent No. 1

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 02/03/2001

ORAL JUDGEMENT

#. The present revision application has been filed by the petitioner who is the original plaintiff of HRP Civil

Suit No.1239/92 which is pending in the Small Causes Court, Ahmedabad.

#. It is the case of the plaintiff in the said suit that, the plaintiff is the landlord of the suit premises. One S.M.Haems had executed a rent note on 6.3.1969 as Proprietor of Nelson English School. It is alleged in the plaint that the said S.M.Haems was occupying the suit premises as tenant in his personal capacity and was running a school in the name and style of Nelson English School. The said personal tenancy came to an end upon the death of the said S.M.Haems. It is the say of the plaintiff that the defendants are asserting the tenancy rights in their favour on the ground that they have inherited tenancy rights after the death of Mr.S.M.Haems. The claim of the defendants is false, frivolous and not bonafide and justifiable. It is the say of the plaintiff that, the suit premises was originally let for running a school, and therefore, there was no question of inheriting the tenancy rights by the defendants. It is the say of the plaintiff that, the defendants, therefore, are not entitled to the protection under section 5(11)(c)(ii) of the Bombay Rent Act. It is also the say of the plaintiff that the defendants' possession is illegal and unlawful and that they are not entitled to the protection under the Rent Act. The plaintiff had also earlier filed HRP Civil Suit No.3241/79 against the deceased Mr.S.M.Haems and the first defendant of the present suit. The said suit was dismissed on 31.7.1984 on the ground that the plaintiff had no authority to file such suit. There was delay in preferring an appeal against the said order which was not condoned. It is the say of the plaintiff in the plaint that, previous suit will not operate as res-judicata. It is also further averred in the plaint that, the deceased tenant allowed the defendants to occupy the suit premises for monetary consideration and that the same was in breach of the terms of the tenancy, and therefore, making the tenant liable to be evicted under section 13(1)(ee) of the Rent Act. It is also averred in the plaint that, no portion of terrace or open ground was leased. Still the deceased tenant falsely claimed tenancy rights and interest in open ground and terrace and thereby committed breach of the terms of the tenancy and therefore also, he is required to be evicted. The aforesaid suit, therefore, has been filed.

#. In the aforesaid suit, an application Exh.5 for interim injunction was given by the plaintiff by which it was prayed that the defendants may be restrained by an order of injunction from transferring, assigning or

parting with the possession of the suit premises described in para 19 of the plaint and further from entering, using and occupying any other premises and properties of the plaintiff and from carrying on construction and put structure over the property including the open piece of land etc.

#. The defendants appeared and resisted the said suit on various grounds. It was contended by the defendants that the suit of the plaintiff is barred by res-judicata as in the earlier suit, it was held that the plaintiff has no right or interest over the suit property. It is also the say of the defendants in the written statement that the school itself is the tenant of the suit premises, and therefore, they have right to continue with the possession. The suit was also resisted on the ground that, Nelson School is also not joined as independent defendant and the suit is bad for want of joining necessary party. It is also averred in the written statement that, so far as the open land is concerned, the school is using the same since more than 20 years. It is also averred in the written statement that, in view of the decision given in HRP Suit No.3241/79 wherein Nelson School was joined as one of the defendants, still in the present suit, the plaintiff has come with the averments that Mr.S.M.Haems was tenant of the suit property. It is stated that, none of the Trustees have got any right in their personal capacity and it is Nelson School who is the tenant of the suit premises. The suit of the plaintiff was accordingly resisted by the defendants on various grounds.

#. The learned Judge, thereafter, by his order dated 30.6.1992 rejected the application Exh.5 which was given for interim injunction. Regarding question of jurisdiction, while deciding the application Exh.5, it is found by the trial Court that, since the plaintiff has averred in the plaint that the defendants have no tenancy right or interest under section 5(11)(c)(ii) of the Bombay Rent Act, the Rent Court has jurisdiction to decide such controversy. Ultimately, therefore, the trial court rejected the application Exh.5 for interim injunction.

#. Against the aforesaid order of the trial court, the present petitioner preferred an appeal being Appeal from Order No.54/92 before the Appellate Court. The original defendants preferred Cross Objections insofar as the finding about jurisdiction of the Court is concerned. The Appellate Bench dismissed the said Appeal from Order and confirmed the order of the trial court so far as the

interim injunction is concerned. The Appellate Court, however, came to the conclusion that the Court of Small Causes, Ahmedabad has no jurisdiction to entertain and try the suit under section 28 of the Bombay Rent Act and accordingly allowed the Cross Objections.

#. The aforesaid order is challenged by the present petitioner, i.e. original plaintiff of the suit by way of filing this revision application.

#. I have considered the reasonings given by the both the courts below and also considered the evidence produced on record.

#. So far as the application Exh.5 for interim injunction is concerned, both the courts below have concurrently found that, there is no prima facie case in favour of the plaintiff and that the balance of convenience is in favour of the defendants. It is not in dispute that in the suit premises Nelson School is functioning and the property is occupied by the Nelson School for the purpose of education to the students who are enrolled in the school. The prayer of the plaintiff in the injunction application which was given in the trial court was that the defendants may be restrained from using the open land of the compound as well as some other interim prayers. However, the court below found that the premises is occupied by the school since long and the said facility is being enjoyed since considerable time. Open ground is used by the students for physical exercise since long and that open ground was used for the purpose of running the school with the consent of previous landlord and that the students of the school are parking their bicycles and scooters on the open land which is in possession of the school. Both the courts below have given cogent reasons for rejecting the application Exh.5 for interim injunction filed by the plaintiff in the suit. I do not find any reason to interfere with such discretionary order passed by the courts below in view of the judgment of the Supreme Court reported in AIR 1973 page 76 in the case of Hindustan Aeronautics Vs. Ajit Prasad. The order of the court below cannot be said to be an order without jurisdiction. The revision application is, therefore, insofar as it challenges the order of the trial court as well as the appellate court regarding interim injunction is concerned, the same is required to be dismissed. It cannot be said that the order of the appellate court and the order of the trial court in this connection suffers from any jurisdictional error. However, the appellate court has allowed the Cross Objection and has given

finding that the Small Causes Court, Ahmedabad has no jurisdiction to decide the suit.

##. In my view, while deciding the application at Exh.5 which is only for interim injunction, it was not necessary to give such a positive finding about the jurisdiction of the Court. Unfortunately, the appellate court has not restricted the said observation only for the purpose of deciding Exh.5. The appellate court has already allowed the cross-objections and has come to the specific finding to the effect that the Small Causes court, Ahmedabad has no jurisdiction. Even otherwise, the aforesaid finding of the appellate Bench is also not proper on merits. In the suit, question of Section 5(11)(c)(ii) of the Bombay Rent Act is involved and there is an averment to that effect in the plaint regarding the non-applicability of the said provision. Therefore, naturally, the question will be required to be decided in the suit whether the said provision is applicable and whether the defendants can get the benefit of the said provision of the Rent Act or not. Prima facie, therefore, at this stage, it cannot be said that there is absolutely no controversy so far as the provisions of the Bombay Rent Act are concerned, which can be said to have been involved in the suit. The observation of the trial court, therefore, at the best can be taken only for deciding Exh.5 application. It was not necessary for the appellate Bench to observe in the operative part of its order that the Small Causes Court has no jurisdiction. The aforesaid question was required to be decided only after the issues are framed and only after the arguments of the parties on the said question are taken into consideration. It is clarified that as and when the suit proceeds, ultimately, the finding about the jurisdiction can be given by the Court on its own merits. Whether the suit is barred by res judicata or not, or whether the Court has jurisdiction to decide the suit or not, are the questions which are required to be decided at the time of hearing of the suit. As and when such issues are framed, the Court will decide the same on its own merits and without being influenced by whatever observations made by the appellate Bench in its order on the aforesaid aspect. It is clarified that this Court has not expressed any opinion on the merits on either of the aforesaid points, i.e. whether the suit is barred by res judicata or whether the court has got jurisdiction to try the suit or not, and it is for the trial court ultimately to decide the same on its own merits. It seems that there is no consequential order of the appellate Bench on the basis of the reasoning given about the jurisdiction of the Court. There is no order either for rejecting or

returning the plaint on the ground of jurisdiction. The trial court, therefore, will have to decide the aforesaid question, as stated earlier, on its own merits and in accordance with law. However, so far as the rejection of the application at Exh.5 is concerned, I see no merit in the revision application so far as the said question is concerned. The aforesaid order is, therefore, confirmed. This revision application, however, is allowed only to the limited extent regarding allowing the cross-objections of the respondents. The said part of the order is set aside.

##. The revision application is accordingly partly allowed. The order refusing injunction is confirmed and order of the appellate Bench regarding allowing the cross-objection is quashed and set aside. The effect of this order is that Exh.5 given by the plaintiff in the suit shall stand dismissed. Rule is made absolute to the aforesaid extent with no order as to costs.

(P.B.Majmudar,J)
(pathan)